

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**BLUEFIELD DIVISION**

<b>THOMAS RYAN RICHARDS,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. 1:12-6268</b>
	)	
<b>JIM RUBENSTEIN, <i>et al.</i>,</b>	)	
	)	
<b>Defendants.</b>	)	

**PROPOSED FINDINGS AND RECOMMENDATION**

On October 5, 2012, Plaintiff, acting *pro se*, filed his Application to Proceed With Prepayment of Fees and Complaint in this matter claiming entitlement to relief pursuant to 42 U.S.C. § 1983.<sup>1</sup> (Document Nos. 1 and 2.) In his Complaint, Plaintiff names the following as Defendants: (1) Jim Rubenstein, Commission of DOC; (2) Dennis Dingus, Warden; (3) McDowell County Correctional Center; and (4) West Virginia Division of Corrections. (Document No. 1, p. 4.) Plaintiff complains that he was injured on a “defective mirror” on August 29, 2012. (*Id.*, p. 5.) Plaintiff explains that “[t]he mirror was metal with 4 rusty screws in it, and it did not have anything to conceal the sharp exposed edges. This mirror was the only mirror in the facility like such.” (*Id.*) Plaintiff alleges that he was seriously injured by the mirror, which resulted in six stitches, significant pain, and the inability to use his left arm for “nearly 3 weeks.” (*Id.*) Plaintiff argues that “[i]t was/is McDowell County’s responsibility to ensure inspections are done and upon finding defective property, it shall be replaced.” (*Id.*) Plaintiff contends that “Defendants failure to do so resulted in a most serious life

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<sup>1</sup> Because Plaintiff is acting *pro se*, the documents which he has filed in this case are held to a less stringent standard than if they were prepared by a lawyer and therefore, they are construed liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

shattering injury.” (*Id.*) Plaintiff requests injunctive and monetary relief. (*Id.*, p. 6.)

### **STANDARD**

Pursuant to 28 U.S.C. § 1915A, the Court is required to screen each case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. On screening, the Court must recommend dismissal of the case if the complaint is frivolous, malicious or fails to state a claim upon which relief can be granted. A “frivolous” complaint is one which is based upon an indisputably meritless legal theory. *Denton v. Hernandez*, 504 U.S. 25, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992). A “frivolous” claim lacks “an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 1831 - 32, 104 L.Ed.2d 338 (1989). A claim lacks an arguable basis in law when it is “based on an indisputably meritless legal theory.” *Id.*, 490 U.S. at 327, 109 S.Ct. at 1833. A claim lacks an arguable basis in fact when it describes “fantastic or delusional scenarios.” *Id.*, 490 U.S. at 327 - 328, 109 S.Ct. at 1833. A complaint therefore fails to state a claim upon which relief can be granted factually when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. With these standards in mind, the Court will assess Plaintiff’s allegations in view of applicable law.

### **DISCUSSION**

#### **1. Improper Parties:**

“[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates.” *Turner v. Safley*, 482 U.S. 78, 84, 107 S.Ct. 2254, 2259, 96 L.Ed.2d 64 (1987). Title 42 U.S.C. § 1983 provides a remedy for violations of all “rights, privileges, or immunities secured by the Constitution and laws [of the United States].” Thus, Section 1983 provides a “broad remedy for violations of federally protected civil rights.” *Monell v. Dep’t of Social Services*, 436 U.S. 658, 685,

98 S.Ct. 2132, 56 L.Ed.2d 611 (1978). Generally speaking, to state and prevail upon a claim under 42 U.S.C. § 1983, a Plaintiff must prove that (1) a person acting under color of State law (2) committed an act which deprived him of an alleged right, privilege or immunity protected by the Constitution or laws of the United States.

Plaintiff names McDowell County Correctional Center and the West Virginia Division of Corrections as Defendants. Section 1983 claims, however, must be directed at a “person.” See Preval v. Reno, 203 F.3d 821 (4<sup>th</sup> Cir. 2000)(unpublished)(finding that the Piedmont Regional Jail is not a “person” under Section 1983); Roach v. Burch, 825 F.Supp. 116, 117 (N.D.W.Va. 1993)(stating that the West Virginia Regional Jail Authority is not a “person” under Section 1983); also see Will v. Michigan Dept. of State Police, 491 U.S. 58, 66, 109 S.Ct. 2304, 2309, 105 L.Ed.2d 45 (1989)(Suits against a state or state agencies for monetary damages are barred by the Eleventh Amendment to the United States Constitution); Webb v. Parsons, 2011 WL 2076419 (S.D.W.Va. May 6, 2011)(finding that the West Virginia Regional Jail Authority, an agency of the State of West Virginia, is immune from suit under the Eleventh Amendment). Accordingly, the undersigned finds that McDowell County Correctional Center and the West Virginia Division of Corrections must be dismissed because they are not “persons” as required by Section 1983.

## **2. Eighth Amendment.**

“[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates.” Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 2259, 96 L.Ed.2d 64 (1987). Title 42 U.S.C. § 1983 provides a remedy for violations of all “rights, privileges, or immunities secured by the Constitution and laws [of the United States].” Thus, Section 1983 provides a “broad remedy for violations of federally protected civil rights.” Monell v. Dep’t of Social Services, 436 U.S. 658, 685,

98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Generally speaking, to state and prevail upon a claim under 42 U.S.C. § 1983, a Plaintiff must prove that (1) a person acting under color of State law (2) committed an act which deprived him of an alleged right, privilege or immunity protected by the Constitution or laws of the United States.

The undersigned views Plaintiff's Complaint as setting forth a claim under the Eighth Amendment. Plaintiff contends that the conditions of the confinement at McDowell County Correctional Center [MCCC] were unsafe because staff failed to remove a "defective mirror," which caused him injury. As a general matter, the Eighth Amendment prohibits punishments which "involve the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976)(quoting Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976)). "It not only outlaws excessive sentences but also protects inmates from inhumane treatment and conditions while imprisoned." Williams v. Benjamin, 77 F.3d 756, 761 (4<sup>th</sup> Cir. 1996). Thus, under the Eighth Amendment, sentenced prisoners are entitled to "adequate food, clothing, shelter, sanitation, medical care and personal safety." Wolfish v. Levi, 573 F.2d 118, 125 (2d Cir. 1978), *rev'd on other grounds*, Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). See also Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 1976, 128 L.Ed.2d 811 (1994)(Supreme Court noted that Eighth Amendment imposes certain duties upon prison officials to "ensure that inmates receive adequate food, clothing, shelter and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'"), quoting Hudson v. Palmer, 468 U.S. 517, 526-27, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984)); Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981)(Court held that only those conditions depriving inmates of "the minimal civilized measure of life's necessities" are sufficiently

grave to form the basis of an Eighth Amendment violation). The Eighth Amendment “does not mandate comfortable prisons.” Rhodes v. Chapman, 452 U.S. at 349, 101 S.Ct. at 2400. “To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.” Id. at 347, 101 S.Ct. at 2399; Shakka v. Smith, 71 F.3d 162, 166 (4<sup>th</sup> Cir. 1995), citing Hudson v. McMillian, 503 U.S. 1, 9, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992); Lopez v. Robinson, 914 F.2d 486, 490 (4<sup>th</sup> Cir. 1990). To establish a violation of the Eighth Amendment in the context of a challenge to conditions of confinement, an inmate must allege (1) a “sufficiently serious” deprivation under an objective standard, and (2) that prison officials acted with “deliberate indifference” to the inmate’s health and safety under a subjective standard. Wilson v. Seiter, 501 U.S. 294, 297-99, 111 S.Ct. 2321, 2323 - 2325, 115 L.Ed.2d 271 (1991). A sufficiently serious deprivation occurs when “a prison official’s act or omission . . . result[s] in the denial of the minimal civilized measure of life’s necessities.” Id. at 298, 111 S.Ct. 2321 (citing Rhodes v. Chapman, 452 U.S. at 347, 101 S.Ct. 2392). “In order to establish the imposition of cruel and unusual punishment, a prisoner must prove two elements – that ‘the deprivation of [a] basic human need was objectively sufficiently serious,’ and that ‘subjectively the officials act[ed] with a sufficiently culpable state of mind.’” Shakka v. Smith, 71 F.3d 162, 166 (4<sup>th</sup> Cir. 1995)(quoting Strickler v. Waters, 989 F.2d 1375, 1379 (4<sup>th</sup> Cir. 1993)(quotation omitted)). See also White v. Gregory, 1 F.3d 267, 269 (4<sup>th</sup> Cir. 1991)(“In *Strickler*, we held that a prisoner must suffer ‘serious or significant physical or mental injury’ in order to be ‘subjected to cruel and unusual punishment within the meaning of the’ Eighth Amendment.”) Therefore, Plaintiff must allege and eventually establish a “sufficiently serious” deprivation of the condition of his confinement resulting in “serious or significant physical or mental injury” in order to maintain and prevail upon their Eighth

Amendment claim.

The undersigned finds that Plaintiff's claim against Defendant Dingus and Rubenstein are improperly raised under the doctrine of *respondeat superior*.<sup>2</sup> Plaintiff complains that he suffered a serious injury due to staff's failure to remove a "defective mirror" at MCCC. Plaintiff contends that as the Warden, Defendant Dingus had a "natural duty to maintain the upkeep and security of the facility." (Document No. 1, p. 4.) Plaintiff alleges that Defendant Rubenstein "did not do his duty as Commissioner to ensure the safety of the inmates or the fellow staff here at MCCC." (*Id.*, p. 6.) "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." Ashcroft v. Iqbal, 129 S.Ct. at 1948 ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); Also see Monell v. Department of Social Services of the City of NY, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Liability, however, may attach to a supervisory official if "conduct directly causing the deprivation was done to effectuate an official policy or custom for which [the official] could be liable." Fisher v. Washington Metro. Area Transit Auth., 690 F.2d 1133, 1142-43 (4th Cir. 1982), *abrogated on other grounds by County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991). Further, supervisory officials may be liable for acts of their subordinates where "supervisory indifference or tacit authorization of subordinates' misconduct may be a causative fact in the constitutional injuries they inflict on those committed to their care." Slakan v. Porter, 737 F.2d 368, 373 (4th Cir. 1984). Thus, the inquiry for the Court is whether the Defendant individually "acted wantonly, obdurately, or with deliberate indifference to the pervasive risk of

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<sup>2</sup> The undersigned further notes that Plaintiff's allegation that Defendants were negligent is insufficient to establish deliberate indifference.

harm.” Moore v. Winebrenner, 927 F.2d 1312, 1315 (4th Cir. 1991).

In the instant case, Plaintiff fails to allege how Defendants Dingus and Rubenstein were personally involved in violating Plaintiff’s constitutional rights. Essentially, Plaintiff alleges that Defendants violated his constitutional rights with respect to his failure to supervise employees. Plaintiff, however, fails to allege any personal involvement by Defendants. There is no indication that Defendants were aware of the “defective mirror,” but failed to take any action.<sup>3</sup> Thus, there is no allegation that Defendants were personally involved in exposing Plaintiff to the “defective mirror,” deliberately disregarded Plaintiff’s exposure to the “defective mirror,” or tacitly authorized the prison officials’ conduct of exposing Plaintiff to the “defective mirror.” Accordingly, Plaintiff has improperly raised his claim against Defendants under the doctrine of *respondeat superior* and has failed to establish supervisory liability. The Court therefore finds that Plaintiff’s Complaint should be dismissed.

### **PROPOSAL AND RECOMMENDATION**

Based upon the foregoing, it is therefore respectfully **PROPOSED** that the District Court confirm and accept the foregoing factual findings and legal conclusions and **RECOMMENDED**

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<sup>3</sup> Plaintiff alleges that Defendant Rubenstein “affirmed the grievance once he received it on September 17, 2012.” The undersigned notes that Plaintiff was injured on August 29, 2012, prior to Defendant Rubenstein’s receipt of the grievance. Additionally, the mere act of denying an administrative remedy request does not constitute personal involvement. *See Fellove v. Heady*, 2008 WL 196420 \*4 (N.D.W.Va. Jan. 22, 2008)(stating that “to the extent that the plaintiff may be asserting that these defendants were deliberately indifferent to his needs by denying his administrative grievances, that claim is also without merit as this is not the type of personal involvement required to state *Bivens* claim”); *Mabry v. Ramirez*, 2007 WL 4190398 \*6 (N.D.W.Va. Nov. 21, 2007)(holding that “denying a prisoner’s institutional grievance is not the type of personal involvement required to state a *Bivens* claim for deliberate indifference to serious medical needs”); *Paige v. Kupec*, 2003 WL 23274357 \*1 (D.Md. March 31, 2003), *aff’d*, 70 Fed. Appx. 147 (4<sup>th</sup> Cir. 2003)(finding that the warden should be dismissed where the only claim against the warden concerned his dismissal of plaintiff’s administrative remedy).

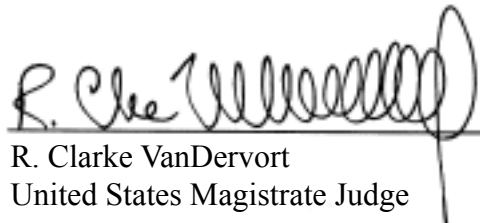
that the District Court **DENY** Plaintiff's Application to Proceed Without Prepayment of Fees (Document No. 2.), **DISMISS** Plaintiff's Complaint (Document No. 1.) and remove this matter from the Court's docket.

The Plaintiff is hereby notified that this "Proposed Findings and Recommendation" is hereby **FILED**, and a copy will be submitted to the Honorable United States District Judge David A. Faber. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rule 6(d) and 72(b), Federal Rules of Civil Procedure, the Plaintiff shall have seventeen (17) days (fourteen days, filing of objections and three days, mailing/service) from the date of filing of this Findings and Recommendation within which to file with the Clerk of this Court specific written objections identifying the portions of the Findings and Recommendation to which objection is made and the basis of such objection. Extension of this time period may be granted for good cause.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, District Judge Faber and this Magistrate Judge.

The Clerk is requested to send a copy of this Proposed Findings and Recommendation to Plaintiff, who is acting *pro se*, and transmit a copy to counsel of record.

Date: August 23, 2013.

  
R. Clarke VanDervort  
United States Magistrate Judge